Filed 2/28/19 Monterey County Dept. of Child Support Services v. P.H. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MONTEREY COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES, Plaintiff and Respondent, v. P.H., Defendant and Appellant. _____ B.R. Plaintiff and Respondent, v. P.H., Defendant and Appellant.	H043351 (Monterey County Super. Ct. No. PT3848)

Appellant P.H. challenges two trial court orders. In December 2015, the trial court issued a "Judgment Regarding Parental Obligations" (Parentage Judgment), finding P.H. to be the father of minor child E.R. based on his refusal to submit to court-ordered genetic testing. In a subsequent order issued in January 2016 (2016 Order), the trial court imputed earning capacity to P.H. and ordered him to pay child support accordingly. The court also ordered P.H. to pay $3,000 in attorney fees and costs under Family Code[1] sections 2030 and 271. We find substantial evidence supports the factual findings

[1] All future undesignated statutory references are to the Family Code.

underlying the Parentage Judgment and the award of attorney fees and costs. We conclude the trial court abused its discretion when it imputed income to P.H. We affirm the Parentage Judgment. We reverse and remand the 2016 Order to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

E.R. was born in October 2013. Respondent B.R. is E.R.'s mother. B.R. and the Monterey County Department of Child Support Services (DCSS) alleged P.H. is E.R.'s father; P.H. denied being E.R.'s parent. In October 2014, DCSS filed a "Summons and Complaint Regarding Parental Obligations" (Complaint) to establish P.H. as E.R.'s parent, and to establish child support. B.R. later filed a separate "Petition to Establish Parental Relationship" (Petition), naming P.H. as E.R.'s father.[3] She asked the court to award her legal and physical custody of E.R., with no visitation to P.H. She also asked the court to order P.H. to pay her attorney fees and other costs of litigation. P.H. responded to each action, denying the allegations.

DCSS filed a motion for judgment of parentage, child support and related orders, and an order for genetic testing of P.H., B.R., and E.R. (DCSS's motion). B.R. filed two separate requests. The first sought orders granting her sole legal and physical custody of E.R., with no visitation to P.H., as well as orders regarding E.R.'s health care costs, child care costs, and health insurance (B.R.'s custody motion). The second sought attorney fees and costs (B.R.'s attorney fees motion). P.H. opposed almost all of DCSS and B.R.'s requests; he consented to B.R.'s custody and visitation requests.

Following a series of hearings, the trial court entered the two orders presently on appeal. The court found P.H. voluntarily violated court orders requiring him to

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[2] The facts pertinent to P.H.'s claims are set forth in greater detail in connection with our discussion of the issues below.

[3] On its own motion, the trial court consolidated DCSS's case into the parentage action.

participate in genetic testing under section 7551[4] and entered the Parentage Judgment based on that finding. Subsequently, the court found P.H. had the capacity to earn $4,583 in self-employment income per month and calculated guideline child support based on that imputed income. The court also ordered P.H. to pay $3,000 in attorney fees to B.R.'s counsel, citing sections 2030 and 271.

P.H. filed a timely appeal from both the Parentage Judgment and the 2016 Order. (Code Civ. Proc., § 904.1, subd. (a)(1) & (10); § 3554 [appealability of support orders].)

II. DISCUSSION

A. Finding of Parentage

Based on the dispute regarding E.R.'s parentage, the trial court ordered P.H., B.R., and E.R. to undergo genetic testing under section 7551. When P.H. refused to comply with the order, the court resolved the question of paternity against him, stating the rights of the child and the interests of justice required that result. P.H. argues the trial court abused its discretion, claiming the court did not properly consider the rights of others and the interests of justice in reaching its ruling as required under section 7551. We find that the trial court did not abuse its discretion, and that substantial evidence supports the court's ruling that the rights of others and the interests of justice compelled a resolution of paternity against P.H.

[4] Subsequent to the trial court's Parentage Judgment, and the parties' briefing in this appeal, the Legislature enacted significant amendments to the provisions of the Family Code concerning the establishment of parentage, including the provisions governing blood tests (§ 7550 et seq.), and the Uniform Parentage Act (UPA) (§ 7600 et seq.). (Assem. Bill No. 2684 (2017-2018 Reg. Sess.).) Unless otherwise noted, all references to these provisions in this opinion are to the versions in existence prior to January 1, 2019, the effective date of the amendments. "We apply the law in effect at the time the trial court made its ruling." (*In re Marriage of Gigliotti* (1995) 33 Cal.App.4th 518, 525.)

1. Factual and Procedural History

a. Factual Background

P.H. and B.R. disputed the nature of their relationship and the events that led to E.R.'s birth. P.H. claimed he met B.R. online and entered into an arrangement with her wherein she agreed to have sex with him in exchange for money from mid-January 2013 to early May 2013. P.H. alleged he agreed to pay B.R. $600 per month to have sex three to four times per month. Further, P.H. claimed B.R. agreed she would be responsible for birth control, while he would provide evidence he did not have a sexually transmitted disease. P.H. contended the parties did not start their sexual relationship until B.R. told him she was taking birth control pills, as each party stated he or she did not want a child. P.H. stated the parties' relationship was purely sexual in nature.

P.H. claimed the parties' relationship ended before P.H. knew B.R. was pregnant, over a dispute as to whether B.R. had provided all of the services for which P.H. paid. B.R. contacted P.H. in July 2013 to notify P.H. of the pregnancy and "demanded" that he give her money for the child's care and support. P.H. "informed her that [he] was exercising [his] own constitutionally-protected right not to have a child and that she was on her own if she chose to do so."

B.R. disputed P.H.'s allegations. While she agreed she met P.H. online, she claimed the parties had a dating relationship after she "made it clear" she was looking for a "long term relationship." She stated the parties dated and had a relationship for six to seven months, including going out to dinner and spending time at each other's homes. She admitted P.H. would give her $800-$900 per month, but she claimed it was to assist with her expenses. P.H. stopped contacting her and stopped giving her money when she became pregnant.

B.R. asserted P.H. did not contribute to E.R.'s support after his birth, despite her repeated requests. B.R. alleged E.R. was born three months premature and now suffered from cerebral palsy and "chronic lung problems." She cared for him by herself,

struggling to keep her job and maintain her status as a Master's Degree student because she took E.R. to weekly physical and occupational therapy visits. She asked the court to establish parentage so she could begin "getting child support for our special needs child and help with his child care costs which are very expensive." She had been caring for E.R. "financially and emotionally" on her own, with no help from P.H., such that she needed "some help financially." Her mother had been helping with child care, but was no longer able to do so.

b. Procedural History

In its March 2015 motion, DCSS asked the court to order P.H., B.R., and E.R. to participate in genetic testing. B.R. later asked the court to enter a judgment of parentage if P.H. did not cooperate with genetic testing orders. Because DCSS is involved in the action, the court initially assigned DCSS's motion to be heard by a child support commissioner,[5] who granted the genetic testing order at a hearing in April 2015. P.H. did not comply with that order prior to the next hearing set by the commissioner, despite DCSS scheduling two appointments for him and contacting him by telephone for follow-up. As P.H. properly objected to the commissioner serving as a temporary judge at the first available opportunity, under section 4251 the commissioner recommended the "elected judge" order genetic testing and hear all remaining matters in the DCSS Complaint. The assigned judge ratified the commissioner's recommendations having received no objection from either party within the statutory deadline of section 4251,

[5] Per section 4251, matters involving DCSS must be heard by a specified court commissioner who acts as a temporary judge unless DCSS or a party objects. "If any party objects to the commissioner acting as a temporary judge, the commissioner may hear the matter and make findings of fact and a recommended order. Within 10 court days, a judge shall ratify the recommended order unless either party objects to the recommended order, or where a recommended order is in error. In both cases, the judge shall issue a temporary order and schedule a hearing de novo within 10 court days. Any party may waive his or her right to the review hearing at any time." (§ 4251, subd. (c).)

subdivision (c). The recommendation that the parties participate in genetic testing thereby became a court order.

At a hearing in September 2015, DCSS offered P.H. the opportunity to test at its office in Salinas that day before driving home to Sacramento, where he lived. The court indicated he would otherwise have to appear at DCSS's office within 10 days to take the test. P.H. declined the offer and stated he would be out of the state for two weeks. The court expressed concern there had been "deliberate delay in this action" to the prejudice of the minor child, as P.H. was "finding reasons to not fully participate in a timely manner." The court found P.H. provided insufficient evidence to support his claim that he was not available to test in the next two weeks. The court also rejected P.H.'s argument that he had insufficient time to find counsel to appear with him at the test, as allowed by "the statute."[6] The court ordered P.H. to participate in genetic testing at the DCSS offices in Salinas by the close of business and set the pending matters for hearing.

P.H. did not comply with the court's order to immediately appear at the DCSS office for testing. DCSS scheduled an additional appointment for P.H. to take the test, which they served notice of to P.H. by mail; P.H. failed to appear. P.H. confirmed receiving the notice.

At the November 2015 hearing, the court provided P.H. an additional opportunity to comply with the court orders, noting a representative from DCSS was present at the courthouse to do the required testing "now." P.H. refused. DCSS then reminded the court section 7551 allows the court to make paternity findings based on a party's refusal to participate in court-ordered genetic testing.

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[6] P.H. did not specify the statute he believed allowed him to have an attorney present during the test at either the September 2015 hearing or the November 2015 hearing. Section 7551 does not include such a provision. That statute falls within the Uniform Act on Blood Tests to Determine Paternity (UABTDP). (§ 7550 et seq.) None of the statutes within the UABTDP include such a provision.

The court confirmed with P.H. that he knew about the court's order for genetic testing and did not follow the order, despite the court's efforts to accommodate the fact P.H. did not live locally. P.H. established his intent to refuse compliance despite knowing he could be held in contempt. He argued that the provision of section 7551 allowing the court to determine parentage based on his refusal to comply with the genetic testing order did not apply in this case. He argued that the circumstances of the case were relevant because the statute requires the court to consider the rights of others and the interests of justice before resolving parentage.

The court questioned P.H. whether the activity he engaged in with B.R. could "lead to the creation of an infant." P.H. indicated the parties engaged in sex, but agreed he would prove he was not HIV positive and B.R. would provide birth control, such that they did not engage in sexual activity until she told him she had obtained birth control. P.H. stated, "I believe that at that time, [B.R.] fraudulently misrepresented that in order to induce me to have unprotected sex with her." The court confirmed P.H. engaged in unprotected sexual conduct with B.R., and such conduct could have led to E.R.'s "creation."

The court determined P.H. knew about the valid court orders and voluntarily decided to violate those orders. The court found P.H.'s refusal to submit to genetic testing sufficient evidence to resolve the question of paternity against P.H., noting, "the Court does find that in the interest of justice and the rights of this child, those rights have been delayed for a period of one year. And there are no grounds for further delay." The court then granted DCSS's request to enter judgment of paternity. On December 7, 2015, the court entered the Parentage Judgment in accord with the rulings made on the record.

2. The Trial Court Properly Applied Section 7551

P.H. challenges the trial court's application of section 7551, which provides, in relevant part, "In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person

who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests. *If a party refuses to submit to the tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require.* A party's refusal to submit to the tests is admissible in evidence in any proceeding to determine paternity." (Italics added.) Although found in the Family Code rather than the Code of Civil Procedure, the provision of section 7551 allowing the trial court to resolve paternity against a party who refuses to comply with genetic testing orders effectively serves as a discovery sanction; "it establishes procedures by which information can be obtained in a civil action and it provides sanctions for refusal to supply the information." (*County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1272 (*Schneider*) [addressing former Evidence Code section 892, a nearly identical predecessor to section 7551].) We review discovery sanctions under the abuse of discretion standard: "We will affirm the sanction order unless it is arbitrary, capricious, whimsical, or demonstrates a ' "manifest abuse exceeding the bounds of reason. . . ." ' [Citations.]" (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108.) "We review any findings of fact that formed the basis for the award of sanctions under a substantial evidence standard of review." (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479.)

a. Rights of Others

P.H. argues the trial court did not properly apply section 7551 because it did not consider the "rights of others" in determining parentage of E.R. based on his failure to comply with court ordered genetic testing. P.H. asserts the trial court erred in considering only E.R.'s rights, rather than P.H.'s own rights. We reject his contention.

As P.H. correctly notes, the trial court must interpret section 7551 based on the plain language of the statute, "giving the words their usual and ordinary meaning." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Section 7551 does not define "others."

The Oxford English Dictionary defines "others" as: "The remaining ones, the rest"; "A separate or distinct person or thing of a kind specified or understood contextually"; "Another person; someone else; anyone else." (Oxford English Dictionary Online, February 2019 <http://www.oed.com/view/Entry/133219?rskey=Bwmqnh&result=1&isAdvanced=false #eid> [as of Feb. 27, 2019], archived at: <https://perma.cc/8CYT-RBPE>.) We conclude that the plain, commonsense meaning of "others" in the context of section 7551 is a person distinct from the "party" who did not comply with the order for genetic testing.

Our interpretation of the statute is consistent with section 7551's status as a form of discovery statute authorizing sanctions against a party who does not comply with discovery requirements. In *Schneider*, the appellate court evaluated the predecessor to section 7551 as a discovery sanction when affirming the judgment of a man who did not comply with court-ordered genetic testing to determine parentage of a child. (*Schneider*, *supra*, 191 Cal.App.3d at pp. 1266-1267.) In doing so, the court compared the circumstances present in *Schneider* to those in *Insurance Corp. v. Compagnie Des Bauxites* (1982) 456 U.S. 694 (*Bauxites*), a case wherein the United States Supreme Court upheld a discovery sanction under Federal Rules of Civil Procedure, rule 37(b)(2), allowing a trial court to strike an answer and enter default against a party who did not comply with a pre-trial discovery order. (*Schneider*, *supra*, 191 Cal.App.3d at p. 1274.) "In *Bauxites*, the court found the presumption justified because the failure of defendants to produce documents made it impossible for the plaintiff to establish the full extent of defendant's contacts with the forum state, 'the critical issue in proving personal jurisdiction.' [Citation omitted.] [¶] Here, the blood tests ordered by the court were equally critical to the County's case. It goes without saying that the act necessarily preceding parentage is procreation. That act, in turn, is invariably private. Witnesses are, to put it mildly, scarce. Blood tests therefore play a crucial role in the accurate determination of paternity. [Citation].)" (*Id.* at pp. 1274-1275.) The court went on to

find that by declining "to take the test, defendant has deprived County and this court of any opportunity to evaluate the probative value of the blood test evidence. The probative value is therefore uncertain. 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' [Citations omitted.] We shall therefore assume the blood test evidence would have had potent probative value in showing defendant was the father of the child." (*Id.* at p. 1276.) Properly viewing section 7551 as a discovery sanction, we conclude that the trial court correctly considered the "rights of others," meaning the rights of those persons who are entitled to the "probative value of the blood test evidence," not the rights of the party or " 'wrongdoer' " who refuses to submit to the genetic test as ordered. (*Ibid.*)

There is sufficient evidence in the record before us that two other persons' interests support the trial court's determination of parentage based on section 7551. First and foremost, the rights of the child, E.R., support entry of the Parentage Judgment based on P.H.'s failure to undertake court-ordered genetic testing. "California law provides that every child has a right to support from both parents. (Fam. Code, §§ 3900, 3901 [former Civ. Code, §§ 196, 196a, 242].) A child has rights independent of its mother, including the right to establish a parent-child relationship with its father and to enforce the father's duty of support. (Fam. Code, §§ 4000, 7600 et seq. [former Civ. Code, §§ 196a, 7000 et seq.].)" (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1841 (*Caruthers*).) " '[T]he establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights.' " (*Id.* at pp. 1844-1845, quoting *Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 277-278.) Establishing parentage not only allows E.R. a right to P.H.'s financial support, it also establishes inheritance rights, access to benefits such as social security, health insurance, and survivor benefits, as well as "psychological and emotional benefits." (*Id.* at pp. 1846-1847; *Kristine M. v. David P.* (2006) 135 Cal.App.4th 783,

788 (*Kristine M.*).) " ' "These rights, in addition to the right to receive child support, are of constitutional dimensions and are entitled to protection under the equal protection clause of the United States Constitution." ' " (*Caruthers*, *supra*, at p. 1847.)

E.R. suffered from cerebral palsy and chronic lung problems, which required weekly therapy sessions. The trial court found that E.R.'s rights to a determination of the issues, namely parentage and support, had been delayed for one year, and there were no grounds to further delay the proceedings. E.R.'s need for support, health insurance, and other benefits related to the determination of parentage provide sufficient basis for the trial court's determination under section 7551.

P.H. suggests the trial court could not rely *only* on E.R.'s rights to support its decision, claiming, "these unidentified rights are present in virtually every case in which a party refuses an order to take a test." He does not identify legal authority dictating which "others" the trial court can or should consider in evaluating section 7551. However, in addition to E.R.'s rights, the record reflects that B.R.'s rights also support the trial court's conclusion. B.R. declared she was struggling to keep her full-time job and maintain her education due to E.R.'s weekly medical appointments. She also stated she needed the support order to obtain assistance from P.H. with childcare for E.R., which was very expensive, especially since her mother was no longer able to assist her. The record before us demonstrates that the trial court did not abuse its discretion in applying section 7551, but considered the rights of others as required by the statute.

b. Interests of Justice

The trial court not only considered the rights of others, but also the "interests of justice" in determining parentage under section 7551. "Public policy and common sense endorse, where possible, creation of a legal parent and child relationship, with the attendant responsibilities and privileges." (*Kristine M.*, *supra*, 135 Cal.App.4th at p. 788, fn. omitted.) P.H. believes the "interests of justice" required the trial court to consider the circumstances of the parties' relationship. Although the trial court questioned P.H.'s

assertion that the nature of the parties' relationship was relevant to its consideration of parentage, the court afforded P.H. the opportunity to present legal authority regarding the relevancy of the parties' relational circumstances; he failed to do so. However, P.H.'s pleadings filed prior to the hearing provided detailed descriptions of his view of the parties' relationship. Nothing in the record indicates the trial court refused to consider P.H.'s pre-hearing pleadings;[7] we therefore presume the judge read and considered P.H.'s declarations. (See Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."]; *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 575 [presumption of Evid. Code, § 664 applies to trial court judges].) "The effect of the rebuttable presumption created by section 664 is ' "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." [Citation.]' [Citations.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550, as mod. on den. of rehg. (June 21, 2007).) P.H. has not shown the court failed to consider the parties' pleadings in ruling under section 7551.

The trial court also received additional evidence at the hearing, specifically asking P.H. whether he knew he was engaging in unprotected sex and understood doing so could result in the conception of a child. P.H. answered yes to both questions, stating his belief B.R. "fraudulently misrepresented [her use of birth control] in order to induce [P.H.] to have unprotected sex with her." In issuing its parentage judgment based on section 7551, it appears the trial court found the evidence P.H. offered to prove B.R. committed a type

[7] Both parties objected to the court considering certain evidence provided by the other, either prior to the November 2015 hearing or at that hearing. The court did not rule on the objections at the November 2015 hearing. "The usual rule is that when a trial court fails to rule on an objection, the objecting party must do something to precipitate an actual ruling, or be deemed to have waived or abandoned the issue. [Citations.] But where the court reserves its ruling, a failure to renew the point has been held not to bar its consideration on appeal; instead, 'the court's failure to rule formally, after having reserved the ruling, constitute[s] an implied ruling against the objection and in favor of admissibility.' [Citation.]" (*People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650-1651.)

of fraud unpersuasive or not credible. "The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings—whether express or implied—must be upheld if supported by substantial evidence." (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410.)

But even if the trial court had found P.H. and B.R. had only a "business relationship" and agreed they would not have a child together who should be supported by P.H., the trial court did not abuse its discretion in concluding the interests of justice required entry of the Parentage Judgment under section 7551. Section 7632 provides, "Regardless of its terms, an agreement between an alleged father or a presumed parent and the other parent or child does not bar an action under this chapter [§ 7630 et seq.[8]]." The parties cannot contract away certain rights vested in the child. In *Kristine M.*, the parties stipulated to terminate a man's parental rights for a child after genetic testing showed him to be the biological father. (*Kristine M.*, *supra*, 135 Cal.App.4th at p. 787.) On appeal by the child, the Court of Appeal found the judgment based on that stipulation to be void as a breach of public policy and as an act in excess of the trial court's jurisdiction. (*Id*. at p. 786.) "Not surprisingly, public policy also prohibits a parent from waiving or limiting, by agreement, a child's right to support. [Citation.] Section 7632 specifically provides that regardless of the terms of any private agreement between a mother and an alleged or presumed father, such agreement does not bar an action to determine paternity under the UPA. The UPA protects the child's right to establish paternity and obtain support irrespective of a parent's intent to foreclose that right.

[8] The Judicial Council form *Petition to Establish Parental Relationship* (FL-200), which B.R. used in this case, references section 7630. The statute specifies who can bring an action to determine parentage and when such an action can be brought. (§ 7630.)

(*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1849, 38 Cal. Rptr. 2d 18.)" (*Id*. at p. 789.)

As DCSS brought its action on E.R.'s behalf, not B.R.'s, the trial court was not bound by any agreement between B.R. and P.H. in determining E.R.'s rights in the matter. There is substantial evidence supporting the finding that the rights of others and the interests of justice required the court to resolve parentage against P.H. under section 7551. The trial court did not abuse its discretion when it entered judgment based on its findings.

3. P.H. Forfeited Constitutional Arguments

P.H. alleges the proper application of the balancing test under section 7551 "could insulate [the trial court] from a constitutional challenge if the statute is used under certain circumstances to unreasonably deprive a party of the right to choose whether to have a child, which is protected by the constitutional right to privacy," citing California Constitution, Article I, section 1. P.H. does not explicitly argue the trial court violated *his* constitutional rights in the instant matter, but suggests constitutional rights *could* be implicated in certain situations. He then discusses the gender-neutral nature of the California Constitution, suggesting a man should have as much say in whether to have a child as a woman. He questions the justice in requiring a man to support a child he does not want.

To the extent P.H. wants this court to address his constitutional rights, DCSS contends he waived that argument by failing to set it forth in a separate point heading as required by the California Rules of Court. We agree. "Each brief must: [¶] … [¶] (B) State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority. . . ." (Cal. Rules of Court, rule 8.204(a)(1)(B).) In his opening brief, P.H. includes his discussion of the constitutional right to privacy under the heading, "The Trial Court Abused Its Discretion by Determining Paternity as a Matter of Law Pursuant to Family Code Section 7551."

(Capitalization omitted.) He does not include a separate heading or subheading addressing the constitutional issue.

Moreover, P.H. failed to provide "reasoned legal argument" in support of any constitutional challenge to section 7551 or its application to him.[9] (*Provost v. Regents of University of Cal.* (2011) 201 Cal.App.4th 1289, 1294 (*Regents*); see Cal. Rules of Court, rule 8.204(a)(1)(B).) B.R. correctly argues P.H. has the burden to show "his rights have been invaded by the actual or threatened application of the challenged law to him." (*Brock v. Superior Court of Los Angeles County* (1939) 12 Cal.2d 605, 614; *Schneider, supra,* 191 Cal.App.3d at p. 1269.) He fails to do this in his brief. Similarly, he does not cite any legal authority recognizing a constitutional right to refuse genetic testing. "Although we address the issues raised in the headings, we do not consider all of the loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument." (*Regents, supra,* at p. 1294.) We agree P.H. has forfeited any constitutional challenge to section 7551 or its application to him. Having reviewed the entirety of the record, we are satisfied that the trial court did not abuse its discretion when it applied section 7551 to enter a parentage judgment against P.H.

B. Use of Earning Capacity to Calculate Child Support

P.H. argues the trial court erred in calculating child support based on his earning capacity rather than his actual income. He claims there is not substantial evidence to support the determination that imputing income is in E.R.'s best interest. Nor does he believe there is substantial evidence supporting the amount of income the trial court imputed to him. While there is substantial evidence to support the trial court's finding

[9] P.H. cites two cases, *Johnson v. Calvert* (1993) 5 Cal.4th 85, 100, and *Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, without providing any explanation as to how the legal issues discussed therein bear on the instant matter or are in any way relevant to an abridgment of P.H.'s constitutional rights.

that imputing some amount of income is in E.R.'s best interest, we conclude the evidence does not support the amount of income the court imputed to P.H.

1. Factual and Procedural History

In its Complaint, DCSS asked the court to order P.H. to pay guideline child support based on his "known income of $5,083.00" per month, although DCSS later admitted it did not know P.H.'s actual income at that time. Based on an internet search, DCSS believed P.H. to be a self-employed attorney in Sacramento, earning at least $61,000, a figure reported for "General Practice Attorney Salaries."

P.H. indicated he had been a self-employed civil appellate attorney since 1989, holding professional licenses in California and Nevada. P.H. explained he last received a paycheck in 1988, becoming a sole practitioner in 1989, doing civil appellate work to supplement his wife's income while he served as the primary caregiver for their children. He alleged he had "not earned a regular income or regularly worked on a full-time daily, weekly, monthly or yearly basis since." He claimed to have gross average earnings of less than $500 per month every year since 2008, with average earnings of less than $100 per month in five out of the previous six years. P.H. also alleged he has suffered chronic back pain for 25 years that "prevents him from sitting or standing for an appreciable length of time without pain and/or discomfort."

As for his actual income, P.H. stated he sacrificed his legal career to care for his children and "full-time attorney wife," who passed away from cancer in March 2009. His wife left her life insurance policy to a trust she created naming the children as beneficiaries, leaving P.H. with "nothing but a mountain of debt and our modest family home," which he owned prior to marriage. P.H. claimed for the next four years he lived on social security disability benefits and disbursements to the children from the trust. The disability benefits ended as each child turned 18; he received the last trust payment in August 2013 when his daughter left for college. P.H. had since lived on his savings, until "finally earning some money this year."

In an income and expense declaration[10] filed prior to the hearing on child support and attorney fees, P.H. claims his average monthly income was $1,100 per month. His deposit account assets totaled $21,000, down $4,000 from the declaration he had filed five months earlier. P.H. claimed $2,348 per month in expenses, with no listed debt. P.H. attached copies of a Social Security statement dated in January 2010, and Internal Revenue Service Account Transcripts from 2009 to 2014 to the declaration. The Social Security statement showed P.H.'s highest earning year was 1987, when he made about $36,000. From 2000 to 2008 he earned a total of about $48,000, although he had four years during that period with no reported income. The tax transcripts reflected adjusted gross income of $54,117 in 2009, and $338 in 2010, with no listed income in 2011, 2012, or 2013. P.H. stated the 2009 figure "is inflated by approximately $45,000" due to a distribution from his wife's pension following her death that year. The transcript from 2014 stated, "Requested Data Not Found."

In response to DCSS's motion, B.R. alleged P.H.'s income was higher than DCSS believed it to be, saying, "Respondent told me he has a very successful law practice and he has been a lawyer for over 30 years. I believe his income is in excess of $10,000 a month." B.R. alleged P.H. misrepresented his income, always had "lots of cash" when they were together, and would give her $800-$900 per month to help with expenses.

Based on an online review of "average incomes of attorneys in Sacramento with Respondent's experience," B.R. believed P.H.'s income was between $87,000-$150,000 per year. She provided the trial court with a declaration an attachment she entitled "Salary Reports for Attorneys in Sacramento." The first six pages of this attachment were noted as "PayScale Salary Reports," seemingly printed from www.payscale.com on

[10] In cases under the Family Code involving child support, attorney fees, or other financial issues, the California Rules of Court require the parties to file an income and expense declaration, using mandatory Judicial Council form FL-150, providing information about the party's income, assets, and expenses. (Cal. Rules of Court, rule 5.92(b)(2), (3), (g)(3).)

July 14, 2015; B.R. did not explain in her declaration where she obtained any of the documents attached in this section. These documents reflected a median pay for a litigation attorney in Sacramento with a law degree and 10 years' experience to be $114,000. The remaining pages in this attachment were a printout from www.indeed.com (Indeed), noting "average salary of jobs matching [a] search" for keywords, "Attorney Lawyer" in Sacramento. The average salary for "Attorney Lawyer" was $106,000; the report also listed average salaries for other job titles, including "Lawyer Operational" and "Lawyer Advanced," both of which averaged $55,000. At the hearing, B.R. argued the average income of an attorney in Sacramento was $114,000 to $150,000, based on the printouts she attached to her November 2015 declaration. The trial court found the printouts B.R. provided from Indeed to be most relevant, listing salaries with a range of $55,000 to $175,000.

P.H. argued the evidence of his actual work history did not support a finding that he had the capacity to earn the amounts addressed in the printouts B.R. provided. Specifically, he argued B.R. provided no evidence that a 57-year old man who has not worked full time for another person in 27 years could be hired for the jobs B.R. suggested, or for any job. P.H. noted the last time he tried to look for outside work was 10 years ago, at which time he was "rejected." He did not have any self-employment work from 2010 until 2015, when he had three cases that earned him $13,000, resulting in an average monthly income of $1,100.

At the hearing, DCSS suggested the court could determine P.H.'s earning capacity using "want adds [*sic*] from the paper," stating it normally goes "to the lower end of the pay scale." DCSS presented the court ads "for attorney one positions and early attorney positions" in the Sacramento area, "for the purpose of showing that offers to bargain exist." The first was for a "research attorney" earning $7,000-$10,000 per month and requiring, "only two years [*sic*] experience." The court also reviewed, "[p]ositions right now that are available for associate attorneys, and a showing, that for associate attorneys,

those with just a few years of experience, after passing the Bar, that the average salary in Sacramento is $86,000." Finally, the court considered an ad for a "staff attorney" requiring one to two years' experience, with a "low range" of $64,850. The court noted there was no evidence of any medical disability that would prevent P.H. from working in a full-time position, particularly one that requires only one to two years of experience.

Ultimately, the trial court found it was in E.R.'s best interest to consider P.H.'s earning capacity in lieu of his actual income for purposes of determining child support. The court considered the evidence presented by B.R. and DCSS, as well as P.H.'s 28 years' experience as an attorney running his own practice, and the fact P.H. was able to pay monthly expenses of $2,348 and still give B.R. $800-$900 per month during the parties' relationship. The court determined the lowest level of earning capacity, $55,000 per year, to be appropriate. Because he was self-employed, the court imputed $4,583 per month in self-employment income to P.H. The findings the court made on the record were incorporated by DCSS into the statewide uniform guideline calculation, resulting in the 2016 Order that P.H. pay $811 per month in guideline child support to B.R.

2. Abuse of Discretion in Amount of Income Imputed to P.H.

a. Standard of Review

"We review an order establishing or modifying child support based upon earning capacity for an abuse of discretion. [Citations.] '[W]e consider only "whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion." . . . "[W]e do not substitute our own judgment for that of the trial court, but determine only if any judge reasonably could have made such an order." ' [Citation.]" (*In re Marriage of McHugh* (2014) 231 Cal.App.4th 1238, 1247, as modified (Nov. 26, 2014) (*McHugh*).)

"California has adopted a 'statewide uniform guideline' for determining child support according to a complex formula based on each parent's income and custodial time with the child. (§§ 4050, 4055; *In re Marriage of Smith* (2001) 90 Cal.App.4th 74,

80-81 [108 Cal. Rptr. 2d 537] (*Smith*).)" (*McHugh, supra*, 231 Cal.App.4th at p. 1245.) Section 4058, subdivision (b) provides, "[t]he court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (§ 4058, subd. (b).) " ' "While deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity [citation], the statute explicitly authorizes consideration of earning capacity in all cases," consistent with the child's best interests. [Citations.]' " (*McHugh, supra,* at pp. 1245-1246.)

b. P.H.'s Ability and Opportunity to Earn Additional Income

" 'Earning capacity is composed of . . . the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications . . . and . . . an opportunity to work . . . .' " (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 685 (*Mendoza*).) "The 'opportunity to work' exists when there is substantial evidence of a reasonable 'likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income.' [Citation.]" (*Smith, supra,* 90 Cal.App.4th at p. 82.) This is the standard a court should use in evaluating the opportunity to work of a self-employed party. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 930 (*Cohn*).)

"The parent seeking to impute income must show that the other parent has the ability or qualifications to perform a job paying the income to be imputed and the opportunity to obtain that job, i.e., there is an available position. The parent seeking to impute income, however, does not bear the burden to show the other parent would have obtained employment if it had been sought." (*McHugh, supra,* 231 Cal.App.4th at p. 1247, citing *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1339; *In re Marriage of Bardzik* (2008) 165 Cal.App.4th 1291, 1305-1306, as modified on denial of rehg. (Aug. 22, 2008) (*Bardzik*).) In *Bardzik*, the Court of Appeal, in finding a party had not met the burden of proof to impute income, discussed the type of evidence

needed to carry the burden. "Conspicuously absent are the sorts of things that helped parents seeking imputation to carry their burden in [previous cases], e.g., the imputee's resume, want ads for persons with the credentials of the potential imputee, opinion testimony (e.g., from a professional job counselor) that a person with the imputee's credentials could readily secure a job with a given employer (or set of employers), or pay scales correlating ability and opportunity with the income to be imputed. Nor was there any vocational examination." (*Bardzik, supra,* at p. 1309.)

P.H. had been a part-time, self-employed civil appellate attorney for most of his career. There is no evidence he ever earned $55,000 in a single year in his career; he earned less than $55,000 in total income in the decade preceding this action according to his Social Security statement and Internal Revenue records. The trial court considered evidence that some attorneys in Sacramento can earn $55,000 per year or more. Yet, there is no evidence attorneys with similar qualifications as P.H. could earn that income, i.e., that he had the ability to earn that amount under the circumstances. The fact P.H. had skills and qualifications that might enable him to earn a certain amount of income was not sufficient alone; the burden of proof " 'cannot be met by evidence establishing merely that a [obligor] continues to possess[] the skills and qualifications that had made it possible to earn certain salary in the past . . . .' " (*Mendoza, supra,* 182 Cal.App.4th at p. 685, citing *In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079.) While B.R. and DCSS presented evidence that certain attorneys in the Sacramento area could earn $55,000 per year or more, and that there were attorney jobs available, B.R. and DCSS did not present any evidence P.H. could earn that amount with *his* skills and experience, such as the expert opinion of a vocational evaluator. (See *Bardzik, supra,* 165 Cal.App.4th at p. 1309.)

Moreover, the trial court erred in looking only at P.H.'s ability and opportunity to earn income from an outside employer rather than as a self-employed attorney. The facts of *Cohn, supra,* are instructive. In *Cohn,* the party imputed with income worked for

many years as a salaried attorney prior to his employer's bankruptcy. (*Cohn*, *supra*, 65 Cal.App.4th at pp. 925-926.) He was out of work for a period due to a mental health condition; once he was able to return to work, he made numerous attempts to find outside employment without success, causing him to open his own practice, also with minimal success. (*Id*. at pp. 926-927.) " '[G]iven his previous experience, education and professional background,' " the trial court imputed him with $40,000 per year income, with a step up to $80,000 per year after one year. (*Id.* at p. 927.) The only evidence supporting these figures was the obligor's testimony that the entry level jobs he had applied for paid around $30,000 to $40,000 per year. (*Id*. at p. 930.) The Court of Appeal found the trial court "acted within its discretion in imputing income to Howard, but that the court's earning capacity figures [were] not supported by substantial evidence." (*Id*. at p. 925.) Rather than considering what the obligor might earn in a job the evidence showed he was not able to procure, "the court's focus should have been what Howard could reasonably expect to earn as a sole practitioner in Sacramento, his stated goal at the time of trial and a reasonable one given his recent history in pursuing employment." (*Id*. at pp. 930-931.) More specifically, the trial court should have considered "what an attorney with Howard's background, age, qualifications, and experience could be expected to earn in his first year as full time solo practitioner." (*Id.* at p. 931.)

In the instant matter, P.H. had not worked for an outside employer since 1988. Unlike the attorney in *Cohn*, there is no reference in the instant record to any *recent* efforts P.H. had made to look for such work. He indicated when he last looked for outside employment 10 years ago, he was "rejected." His attorney work experience for the last 27 years had been as a part-time, sole practitioner. While in *Cohn* the obligor conceded he had some ability to earn more income than he was earning at the time of trial (*Cohn*, *supra*, 65 Cal.App.4th at p. 931), P.H. did not make such a concession. As in *Cohn*, rather than basing its earning capacity determination on what a litigator in a law

firm in Sacramento might earn, the trial court here should have considered specifically what P.H. could earn as a sole attorney, his only experience for almost three decades of law practice. Absent such evidence B.R. failed to meet her burden of proof regarding P.H.'s ability and opportunity to earn the $4,583 per month imputed to P.H. by the trial court.

Nor do we find any other basis in the record to support the figure the court used as P.H.'s income in calculating child support. In issuing its ruling, the trial court cited P.H.'s ability to pay $2,348 per month in expenses in addition to providing B.R. with $800-900 per month in cash during the course of the relationship. The court did not indicate it considered this amount as evidence of P.H.'s actual income in determining his child support obligation; the court calculated support based on imputed income of $4,583 per month. The trial court can, under appropriate circumstances, determine evidence of a party's lifestyle reveals greater actual income than the party claims in tax returns or other supporting documentation. (See *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 336 (*Loh*).)[11] The record in this appeal does not support such a finding for P.H. There is no evidence regarding P.H.'s bank accounts, aside from that provided in his income and expense declaration, indicating his deposit account balance decreased in the five months preceding the January 2016 hearing.

However, while we do not find substantial evidence supporting the amount of income the trial court imputed to P.H., there is substantial evidence supporting the trial

[11] In *Loh*, the Court of Appeal compared one party's ability to establish that the other's income was more than he or she reported in tax returns or income and expense declarations to the IRS's ability to show that a "taxpayer's 'lifestyle' belies his or her *reported* income." (*Loh*, *supra*, 93 Cal.App.4th at p. 336.) "[T]here are established ways the IRS goes about computing income based on the contention that a taxpayer's manner of living is inconsistent with his or her reported income. [Citation.] For example, the IRS can examine a personal bank account to see where the money for the various withdrawals is coming from. [Citation.] And we have no doubt the expert testimony of a forensic accountant could serve in a child support case to establish that a parent's true income under the tax laws was not reflected on his or her tax returns." (*Ibid*.)

court's finding that it would be in E.R.'s best interest to impute some amount of income to P.H., to the extent P.H. has the ability and opportunity to earn more than his current actual income. P.H. cites *In re Marriage of Ficke* (2013) 217 Cal.App.4th 10, 20-21 (*Ficke*), for the proposition that imputation resulting in higher support paid for the child is not in and of itself sufficient to support a finding that imputation of income to a parent is in the child's best interest. But *Ficke* is distinguishable from the instant matter because it addressed the benefit to the child of increased child support as a result of an order imputing income to a custodial parent, as opposed to the benefit to the child of increased time with a parent. (*Id*. at pp. 21-22.) P.H. has no custodial time with E.R. and does not intend to spend time with him. Here, the trial court made an explicit finding regarding E.R.'s best interest. E.R. had medical conditions that required weekly medical appointments. B.R. provided E.R.'s financial and emotional support on her own, making it difficult to maintain her full-time employment and education. She also required assistance to pay for child care. The evidence supports the trial court's finding that any additional financial support E.R. receives based on appropriate imputation of income to P.H. is in E.R.'s best interests.

We are mindful that in reversing the trial court's order, we present the trial court with a challenge. Many litigants in the family court lack significant financial resources. They are often self-represented, do not have access to experts such as vocational examiners or job counselors, and are not employed in jobs that produce resumes. But the trial court can consider whether the obligor has exercised reasonable diligence in obtaining employment, can look at the living expenses of the obligor to determine whether his assertions of lack of earnings are credible, and can impute income accordingly. The *Cohn* court remanded the matter to the trial court for further proceedings, as we do, noting, "On remand, the court will have a much better track record from which to view the issue. Presumably, Howard would have had more than a year in which to establish his law practice. If it turns out that he continued to generate

extremely low income figures as a self-employed attorney in Sacramento (as he did in Hayward) the inquiry may need to refocus on such issues as to whether Howard exercised reasonable diligence in developing his law practice or alternatively what employment opportunities were available in the nonlegal field to someone with Howard's skills and experience." (*Cohn, supra,* 65 Cal.App.4th at p. 931.) Here, the trial court on remand also may well consider P.H.'s diligence in developing his law practice, or what skills he can apply to jobs outside of the practice of law. However, based on the record before us, we conclude that, while imputation of income, if appropriate, is in E.R.'s best interest, the trial court abused its discretion in imputing income to P.H. in the specific amount entered into the guideline child support calculator as there is not substantial evidence supporting its finding that P.H. had the ability and opportunity to earn $55,000 per year.

C. Attorney Fees and Costs

At the January 2016 hearing, the trial court ordered P.H. to pay $3,000 to B.R. as attorney fees and costs under sections 2030 and 271. We find the court properly exercised discretion to award fees and costs under provisions of the Family Code allowing a need-based award in the amount of $3,000. Thus we will not address P.H.'s contentions under section 271.

1. Relevant Factual and Procedural History[12]

B.R. first raised attorney fees and costs in her Petition, asking the court to order P.H. to pay $5,000. Although she did not check the boxes for attorney fees and costs in her custody motion, she did reference her request for $5,000 in her attached declaration. B.R. formally requested attorney fees and costs in her attorney fees motion. As with her other pleadings, she did not explicitly cite legal authority in support of her request. She

[12] As we will not address P.H.'s contentions under section 271, we will not address the sufficiency of the evidence presented to the trial court regarding the substance of B.R.'s request for sanctions under that statute.

did attach the Judicial Council forms *Request for Attorney's Fees and Costs* (FL-319) and *Supporting Declaration for Attorney's Fees and Costs Attachment* (FL-158).

B.R. provided a similar declaration with her Petition, custody motion, and attorney fees motion, alleging P.H. was a longtime attorney with substantial income, whereas she was a single mother struggling to care for a special needs child while working full-time and attending school. In later declarations, B.R. alleged P.H. always "had a lot of cash" when they were together; she claimed he gave her $800-$900 per month to help her with expenses. P.H. opposed the request for attorney fees, arguing B.R.'s attorney failed to include "any relevant or admissible evidence in the petition or supporting declaration to even suggest she has any right to make me pay the requested fees." He requested that the court award him attorney fees as well.

B.R.'s income and expense declarations revealed salary of $4,366 per month, with an increase in her average monthly income from $3,850 in June 2015 to $4,644 in January 2016. In her most recent income and expense declaration, B.R. listed her monthly expenses as $4,156. While she disclosed $4,300 in deposit account assets in June 2015, she did not list any such assets in January 2016. Her total amount of debt had increased from just over $12,000 in June 2015 to almost $30,000 in January 2016, seemingly due to the addition of over $15,000 for "Social Security" "[o]verpayment." B.R.'s attorney fees had also increased, from $2,500 in June 2015 to at least $6,495 in January 2016; at one point B.R. indicated she had incurred $8,000 in fees, of which she had paid $3,500.

P.H.'s most recent average monthly income was $1,100, an increase from the $600 he reported in August 2015. His deposit account assets decreased from $25,000 to $21,000 since August 2015. P.H. claimed $2,348 per month in expenses, with no listed debt. Although he transferred ownership of his home to his son, P.H. claimed to have mortgage and property tax expenses in both the income and expense declarations he filed with the trial court.

At the January 2016 hearing, B.R. asked the court to order P.H. to pay $5,000 of her attorney fees from his savings of $21,000. B.R.'s attorney did not cite any legal authority in making the request. Rather, the court asked if the request was "a 2030, 2032 request or a sanction based request." B.R.'s counsel responded, "It is both." B.R. did not introduce any additional evidence regarding P.H.'s financial circumstances.

P.H. confirmed he earned an average of $1,100 per month, based on having earned $13,000 from three recent cases. He stated he had lived off of savings since his wife died, noting his savings went down $4,000 between his two income and expense declarations.

In discussing attorney fees, P.H. told the court he was "just learning now that this—that these attorney fees are being sought as a sanction." He assumed B.R. sought fees under section 3557, subdivision (a) and asked the court for clarification. The court indicated the statutes at issue were sections "2030 . . . 2032, or the sanction of . . . 271." P.H. indicated he did not know what 2030 or 2032 required, but argued, based on his understanding of section 3557, that B.R. had not shown a need for an attorney, a disparity in access of funds for the attorney, or that P.H. has the ability to pay.

At the end of the hearing, after imputing income to P.H. and calculating guideline child support accordingly and ordering P.H. to pay just over $6,000 in childcare costs, the court ordered P.H. to pay $3,000 towards B.R.'s attorney fees, in monthly installments of $1,000. In doing so, the court stated, "Under Family Code Sections 2030, 2032 and 271, the court is obligated to consider that the self-represented litigant, who is an attorney of record, of many years, has informed himself of the basis for requests that have been made." The court found "there is both a need on the part of the petitioner, and an ability on the part of the respondent . . . for respondent to pay legal fees and the sum." The court did not designate any portion of the award to sections 2030 and 2032 as opposed to section 271.

2. Need-Based Fees and Costs

P.H. argues the trial court abused its discretion by ordering him to pay B.R. $3,000 in attorney fees and costs under sections 2030 and 2032. He challenges the order on three grounds. First, he argues the legal authority cited by the trial court and B.R. in support of the order does not apply in the instant parentage action. Second, he argues there is not a disparity in the parties' access to legal representation. Finally, he claims the trial court erred in basing its findings on his assets, given his lack of actual income. While the trial court cited the incorrect statute in ordering attorney fees, we find the error did not result in prejudice to P.H. in light of the other applicable statutes authorizing identical relief. P.H. received appropriate notice of B.R.'s request for attorney fees and costs based on the parties' relative financial circumstances. There is substantial evidence of a disparity in the parties' access to legal representation. The trial court did not err in considering P.H.'s assets.

"The family court has broad discretion in ruling on a motion for fees and costs; we will not reverse absent a showing that no judge could reasonably have made the order, considering all of the evidence viewed most favorably in support of the order." (*In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 657.) We review the trial court's decision for abuse of discretion. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 283.)

a. Citation to Section 2030 Was Not Prejudicial

Prior to the January 2016 hearing, B.R. did not specify legal authority in support of her request for attorney fees and costs.[13] P.H. correctly notes that section 2030, cited by the trial court and B.R. at the hearing, does not apply to actions for determination of parentage under section 7600 et. seq. Section 2030 provides, "In a proceeding for

[13] Parties in proceedings under the Family Code do not have to file a memorandum of points and authorities unless required by the trial court on a case-by-case basis. (Cal. Rules of Court, rule 5.92(b)(6) [adopted eff. 7/1/2016, formerly rule 5.92(c)].)

dissolution of marriage, nullity of marriage, or legal separation of the parties, . . . the court shall ensure that each party has access to legal representation, . . . to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees . . . ." (§ 2030, subd. (a)(1), italics added.) Section 2032 guides the trial court in evaluating a request under sections 2030 or 2031 [another statute addressing attorney fees in a dissolution, nullity, or legal separation proceeding]. (§ 2032, subd. (a).) Section 2030 requires the court to make specific findings before granting a request for attorney fees and costs: "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." (§ 2030, subd. (a)(2).)

However, while section 2030 does not explicitly apply to the instant matter, there are similar statutes found throughout the Family Code that do apply. Section 7605, relevant to parentage actions, provides, "In any proceeding to establish physical or legal custody of a child or a visitation order under this part [§ 7600 et seq.] . . . the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees . . . ." (§ 7605, subd. (a).) The statute requires the court to "make findings on whether an award of attorney's fees and costs is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney's fees and costs." (§ 7605,

subd. (b).) B.R. asked the court to make custody and visitation orders in her Petition for a parentage judgment and custody motion.

Cited by B.R. in her response to this appeal, section 7640 provides, "The court may order reasonable fees of counsel . . . and other costs of the action and pretrial proceedings, including blood tests, to be paid by the parties . . . in proportions and at times determined by the court." Although the statute does not explicitly indicate the court must consider the parties' financial circumstances, the appellate courts have interpreted it as such a statute, in conjunction with section 270, which provides, "If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay." "Section 7640 requires the trial court to determine what amount of fees is 'reasonable,' . . . and section 270 requires the court to determine that the party being ordered to pay 'has or is reasonably likely to have the ability to pay.' " (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 447.) "The principle of the best interests of the child is the sine qua non of the family law process governing custody disputes." (*Ibid.*) Imposing attorney fees on the wealthier party in paternity actions "ensure[s] that both sides of the custody dispute are represented and are able to present evidence bearing on the best interests of the child" when "a court is determining who gets custody of a child." (*Id.* at p. 451.) Section 7640 applies both in proceedings to enter a parentage judgment, and in proceedings held after the judgment, including proceedings regarding custody, visitation, and support. (*Robert J. v. Catherine D.* (2005) 134 Cal.App.4th 1392, 1404.) "[W]e read section 7640 as granting the trial court the discretion to apportion attorney fees for postjudgment proceedings based on the parties' *relative abilities to pay*." (*Id.* at p. 1404, italics added.)

At the hearing on B.R.'s request for attorney fees, P.H. stated his assumption B.R. sought fees under section 3557. Like section 2030, that statute does not explicitly apply in the instant matter; it authorizes fees in an action to enforce a previous child or spousal

support order. (§ 3557, subd. (a).) Yet, section 3557 also has language requiring the trial court to consider the parties' relative financial circumstances. "Notwithstanding any other provision of law, absent good cause to the contrary, the court, in order to ensure that each party has access to legal representation to preserve each party's rights, upon determining (1) an award of attorney's fees and cost under this section is appropriate, (2) there is a disparity in access to funds to retain counsel, and (3) one party is able to pay for legal representation for both parties, shall award reasonable attorney's fees to any of the following persons. . . ." (§ 3557, subd. (a).) P.H. did not argue section 3557 does not apply to the instant matter. Rather, he argued B.R. did not present evidence to show any of the elements he believed to exist in that statute.

In B.R.'s attorney fees motion, she checked the boxes in the caption and on page three of the Judicial Council form *Request for Order* (FL-300) (RFO) seeking attorney fees and costs. Although B.R. did not provide a memorandum of points and authorities with her motion, she did attach Judicial Council form FL-319 *Request for Attorney Fees and Costs Order Attachment* (FL-319), as required by Section 5 of the RFO, as well as California Rules of Court, rule 5.427.[14] The form FL-319 attached to B.R.'s motion referenced sections 2030, 2032, 3557, and 7605. The form attachment also referenced California Rules of Court, rules "5.425 and 5.93 [renumbered to 5.427 in January 2013 without substantive change]." The pleadings B.R. filed put P.H. on notice she would request fees and costs related to the parties' relevant financial circumstances.

Although the trial court incorrectly cited sections 2030 and 2032, rather than one of the applicable need-based statutes, there is substantial evidence P.H. had notice B.R. would seek attorney fees and costs based on the parties' relative financial circumstances. It is not reasonably probable that the trial court would have reached a result more

[14] "This rule applies to attorney's fees and costs based on financial need, as described in Family Code sections 2030, 2032, 3121, 3557, and 7605." (Cal. Rules of Court, rule 5.427(a).)

favorable to P.H. had it considered section 7605 or 7640, given that those statutes are nearly identical to section 2030. We agree with B.R. this is error that does not, by itself, require us to reverse the trial court's decision. (See Cal. Const., art. VI, § 13; *In re J.S.* (2011) 196 Cal.App.4th 1069, 1078-1079.)

b. Substantial Evidence Supports the Award

The statutes authorizing an award of fees and costs based on need and/or ability to pay "require a *comparative analysis* of the parties' circumstances and/or needs and serve the common purpose (shared by all the Family Code statutes that authorize attorney fee awards) of ensuring, 'to the extent possible, that the litigating parties are on an equal footing in their ability to present their cases . . . .' [Citation.] Thus, sections 7605 and 2030 focus on the parties' '*respective* incomes and needs' and '*respective* abilities to pay.' (§ 7605, subd. (b), italics added; see § 2030, subd. (a)(2).)" (*Kevin Q. v. Lauren W.* (2011) 195 Cal.App.4th 633, 643 (*Kevin Q.*).) Although section 2032 on its face applies only in actions related to marriage, the trial court can take into account the "standards and circumstances pertinent under a section 2032 comparative analysis" when considering a request for need-based fees in a parentage action. (*Kevin Q., supra,* at p. 644.) Section 2032 requires the court to consider what is "just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to

apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).)

There is substantial evidence supporting the trial court's finding that B.R. had need for the award of attorney fees, and P.H. the ability to pay, based on the information the parties provided in the parties' January 2016 income and expense declarations. Despite claiming to have average monthly income of only $1,100, P.H. was able to pay $2,348 per month in expenses without incurring any identified debt. He had $21,000 in deposit account assets at the time of the hearing. The value of these assets did decrease $4,000 from August 2015 to January 2016, suggesting P.H. was using the funds to cover the difference between his income and expenses. P.H.'s income had increased since the time of the parties' relationship. During that relationship, P.H. had the ability to give B.R. between $600 to $900 per month. While B.R. earned more from employment than P.H., she also had higher expenses. B.R. disclosed almost $30,000 in debts. The facts denote a disparity in the parties' access to legal representation, as well as P.H.'s ability to pay $3,000 towards B.R.'s fees and costs. While the trial court did emphasize P.H.'s assets in its ruling, the record shows it considered numerous facts about the parties' circumstances in reaching its decision. P.H. has not met his burden to show the trial court abused its discretion by awarding $3,000 in needs-based attorney fees.

D. Insufficient Evidence to Reassign on Remand

Finally, P.H. asks us to order the matter reassigned to a new judge upon remand to the trial court, alleging the assigned judge was biased against him. "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (Code Civ. Proc., § 170.1, subd. (c).) "Our power to direct that a different judge hear the matter on remand should be 'used sparingly and only where the interests of justice require it.' [Citation.]" (*In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 153.) We will order

reassignment only on a showing of actual bias or the appearance of bias. (*Ibid*; see *People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1080.) P.H. has not made the required showing and we deny his request to reassign the case on remand.

"Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) provides that a judge is disqualified if 'A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.' The words and conduct of [a judge can] create a doubt that he or she will be able to be impartial on remand." (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1327 (*Tharp*).) Although P.H. does not cite any legal authority in support of his request, he argues the words and conduct of the trial judge create a doubt she will be impartial on remand.

P.H. first alleges that the assigned child support commissioner's written findings and recommendations evidenced bias against him. The commissioner stated, "The DCSS attorney opined that, based on Father's actions so far, 'this will be a procedural nightmare.' " P.H. does not cite any legal authority indicating we should hold one judge responsible for the actions of another judicial officer.

He next argues the trial judge demonstrated partiality at the hearing in July 2015 when she denied P.H.'s request to consolidate the parentage action into the DCSS action to avoiding the additional filing fee. P.H. asked the judge if he needed to file a separate response. Upon confirming P.H. was an attorney, the trial court told P.H. he could research that issue and pose it again at the next hearing if he could not find the answer on his own. The trial court is not allowed to act as counsel for a party representing himself in the proceedings. (*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1008.)

P.H.'s next concern relates to his challenge to the trial judge under Code of Civil Procedure section 170.3. P.H. filed his challenge in July 2015. At the hearing in August 2015, P.H. indicated his belief that the process server he retained had served the challenge on the judge or her clerk; the judge denied receiving such service. P.H. argues, "without any evidence to support it, Judge Whilden immediately suggested that the

mistake was made intentionally in order to delay the proceedings and wondered aloud whether Appellant was accusing the court of lying about whether service had been proper." We find no bias evidenced in the court's comments. The judge expressed concern about further delaying the proceedings because it "causes prejudice to the other party who has been suffering delay since this case was initiated . . . ."

At the hearing in September 2015, P.H. suggests the trial court showed partiality by rejecting the evidence he offered in support of his claim he would be out of town for two weeks and unavailable to do the genetic testing. He then notes the court considered holding him in contempt for violating the genetic testing orders before determining parentage as a matter of law instead. The fact a judge rules against a party does not, by itself, show bias. (*Tharp*, *supra*, 188 Cal.App.4th at p. 1328.)

P.H. cites numerous issues from the January 2016 hearing as evidence of the trial court's alleged partiality: her finding of imputed income despite the evidence of his work history; the award of sanctions based on dilatory conduct P.H. denies and improper notice to him, as well as his inability to pay the award; the judge's suggestion that P.H. underreported his expenses; and the judge's refusal to accept evidence of his mortgage payments in calculating support. While we see no evidence of bias in the judge's conduct at the hearing, we note also that P.H. did not cite to the record in making these arguments. (See Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief must: [¶] . . . [¶] Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."]; *Young v. California Fish and Game Commission* (2018) 24 Cal.App.5th 1178, 1190-1191, rehg. den. (July 20, 2018), review denied (Sept. 26, 2018) [the appellate court may deem waived any point unsupported by a citation to the record].)

P.H. has not shown evidence of bias or the appearance of bias on the part of the trial judge. We decline to order reassignment of the case on remand.

III. DISPOSITION

The Parentage Judgment is affirmed. The 2016 Order is reversed and remanded for rehearing in the trial court for calculation of child support and the determination of whether income should be imputed to P.H. Each party shall pay his or her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

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Greenwood, P.J.

WE CONCUR:

_____
Grover, J.

_____
Danner, J.

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